IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 48

COMMUNIST PARTY OF THE UNITED STATES

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD.

MOTION AND BRIEF FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The undersigned, as counsel for the American citizens, whose names are hereto attached (Appendix A), respectfully moves this Honorable Court for permission to file the accompanying brief, *amici curiae*. The attorneys for the petitioner have consented to the filing of this brief.

Permission for leave to file has been requested from the Solicitor General of the United States. A copy of this request is hereto attached (App. B). The Solicitor General has not acceded to the request on the ground that he does not see a direct enough interest on our part but has stated that if a timely motion is made to this Court for such permission he will not oppose it (App. C).

Any American may be or may wish to become a member of an organization which may fall within the purview of the Act. We submit, therefore, that every American has

an interest in the outcome of this case that is both real and direct. Every American, if the Act is upheld, may well hesitate to remain or become a member of any organization which may be found to fall within purview of the Act. The Act establishes a barrier of non-association with any person who espouses "dangerous" causes and non-association in the affairs of any organization which espouses, or might espouse, controversial views.

The Act itself destroys the very democratic processes which, in another type of case, we would be asked to rely on for its correction and forces us back to relying on the interpretation of the Constitution by this honorable Court.

We are aware that this solution of the problem gives rise to a procedural difficulty. On the one hand, the nature of the problem is such, and its bearing on the rights of every citizen so great and immediate, as to suggest that every interested individual ought to have a right to be heard before the tribunal charged with responsibility for the final decision. On the other hand, the judicial process is adapted to hearing the claims of a small number of persons whose involvement in the immediate problem makes them parties before the Court. The device of the *amicus curiae* brief resolves this dilemma as well as we are able to resolve it. It permits us to express, in a form traditional and appropriate to the judicial process, our profound conviction that it is our liberties—and not just those of the Communist Party—on which the Court is being asked to rule. Moreover, no matter how ably the attorneys for the Communist Party may present the case, it is their right and duty to present it from the point of view of and the effect on the Communist Party and Communists. We desire to present the evils of the Act from the point of view of non-Communists. Nor, we submit, is our presentation premature since different questions may be involved as to non-Communist and Communist organization. The Act must be judged and its constitutionality determined in the light of

its total impact and that impact is not limited by the details of this, on any other, particular proceeding.

A summary of the points to be made is contained in the index of the brief which is hereto annexed and made a part of this motion.

WHEREFORE, it is respectfully requested that this Honorable Court grant this motion to file the annexed brief as *amici curiae*.

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INDEX

INDEX OF CASES

INDEX OF COMMENTS

Supreme Court of the United States

COMMUNIST PARTY OF THE UNITED STATES, Petitioner, v. SUBVERSIVE ACTIVITIES CONTROL BOARD.	October Term, 1955 No. 48

BRIEF AS FRIENDS OF THE COURT

Statement

It is with the deepest concern over what we, the undersigned, believe to be the most terrible threat so far devised to freedom in America, the "Internal Security Act of 1950" that we request permission to file this brief. We cherish the ideal which gave our country birth and made it a mighty instrument in human progress, the ideal of a free people living under a government by law in which the few may not tyrannize over the many or the many over the few. We believe that such a concept of government, valuable as it has been in the past, is essential now. We believe that never before in our history has freedom to dissent, freedom to be different, freedom to experiment, freedom even to be wrong fallen into such a low estate nor the possibility that "government of, by and for the people" may pass from the American scene been more real. We believe that a new era opened in international affairs at Geneva which demands an agonizing reappraisal of the "clear and present danger" found to exist when this Court upheld the Smith Act. We believe as the eminent group of scientists, headed by the late Albert Einstein, recently said that:

> "There lies before us, if we choose, continual progress in happiness, knowledge and wisdom. Shall we, instead, choose death because we cannot forget our quarrels?

> We appeal, as human beings to human beings, remember humanity and forget the rest. If you can do so, the way lies open to a new paradise; if you cannot, there lies before you the risk of universal death."

We believe not merely freedom from war but freedom to think and freedom to dissent to be prerequisites of entering the world of promise, the way to which is open. We urge upon this honorable Court the need for America to recover the distinction between dissent and treason.

We hold as a firm tenet of our faith that violent revolutions should never be resorted to in a society where orderly change through the will of the people, freely expressed at the polls, is possible. We believe, however, that radicals as well as liberals and conservatives must, in such a society as ours, be guaranteed the right, within the framework of the democratic process, to urge changes which they seek. Radicals in the past have often been wrong but they have served a useful purpose, even when wrong, in calling attention to evils that demand correction. Any society which suppresses its most uncompromising critics runs the risk of becoming static. If there had not in every age been those who said, "Things are not good enough. We demand changes here," we would still be living in caves and wearing skins or loin cloths.

The truths for which we speak have found expression in memorable utterances by members of this Court.

In the August 1955 issue of The Progressive is an article by Chief Justice Warren in which he paid tribute to Bob LaFollette, which is prophetic in the truest sense of that word. The Chief Justice said:

> "There are still those among us who would call it (LaFollette's program) socialism; those who refuse to make any distinction between socialism and social progress; those whom Lincoln described as being unable to distinguish a horse chestnut from a chestnut horse.

> There will be such in every generation * * * freedom itself is radical * * *. Again he was squarely in the American tradition, with its reliance on the idealism and innate reasonableness of men. He had an old-fashioned faith in the sovereign power of reason in human affairs. But pre-eminently, Bob LaFollette was a dissenter—a dissenter in the finest sense of the word."

In his introduction to An Almanac of Liberty, Mr. Justice Douglas said:

> "There is room in this great and good American Family for all the diversities the Creator has produced in man. Our CONSTITUTION and BILL OF RIGHTS were, indeed, written to accommodate each and every minority, regardless of color, nationality, or creed. That is our democratic faith. Out of that diversity can come a unity the world has never witnessed.
>
> "The need these days is to practice and preach that democratic faith. It can easily become the most contagious political force the world has ever known. But we must first redeem it. In recent years, we have let it fall to low estate, as the people of Europe and Asia probably know better than we."

Mr. Justice Black, in his prophetic dissenting opinion in *American Communications Association* v. *Douds*, 339 U. S. 382 at 448, foresaw the possibility of such further encroachments on freedom as we have in this Act when he said:

> "But not the least of the virtues of the First Amendment is its protection of each member of the smallest and most unorthodox minority. Centuries of experience testify that laws aimed at one political or religious group, however rational these laws may be in their beginnings, generate hatreds and prejudices which rapidly spread beyond control. Too often it is fear which inspires such passions, and nothing is more reckless or contagious. *In the resulting hysteria, popular indignation tars with the same brush all those who have ever*

*been associated with any members of the group under attack or who hold a view which, though supported by revered Americans as essential to democracy, has been adopted by that group for its own purposes * * *. Guilt should not be imputed solely from association or affiliation with political parties or any other organization, however much we abhor the ideas which they advocate * * *.* Fears of alien ideologies have frequently agitated the nation and inspired legislation aimed at suppressing advocacy of those ideologies. At such times the fog of public excitement obscures the ancient landmarks set up in our Bill of Rights. Yet then, of all times should this Court adhere most closely to the course they mark." (Emphasis supplied.)

Mr. Justice Burton joined in an opinion with Mr. Justice Jackson in *Terminello* v. *Chicago*, 337 U. S. 1 where he said at p. 36:

"Suppression has never been a successful permanent policy; any surface serenity that it creates is a false security; while conspiratorial forces go underground. My confidence in American institutions and in the sound sense of the American people is such that with a stroke of the pen I could silence every fascist and communist speaker, I would not do it. For I agree with Woodrow Wilson who said: 'I have always been among those who believed that the greatest freedom of speech was the greatest safety, because if a man is a fool, the best thing to do is to encourage him to advertise the fact by speaking.'"

In his letter to the Chairman of the Loyalty Review Board dated November 29, 1947, Mr. Justice Clark, then Attorney General, gave the following memorable warning:

"In connection with the designation of these organizations I wish to reiterate, as the President has pointed out, *that it is entirely possible that many persons belonging to such organizations may be loyal to the United States;* that membership in, affiliation with, or sympathetic association with, any organization desig-

> nated, is simply one piece of evidence which may or may not be helpful in arriving at a conclusion as to the action which is to be taken in a particular case. *'Guilt by association' has never been one of the principles of our American jurisprudence. We must be satisfied that reasonable grounds exist for concluding that an individual* is disloyal. That must be the guide." (Letter of Tom C. Clark, Attorney General, November 29, 1947, to the Chairman of the Loyalty Review Board.) (Emphasis supplied.)

In his concurring opinion in *Dennis* v. *United States*, 341 U. S. 494, Mr. Justice Frankfurter pointed out at p. 548 that:

> "The treatment of its minorities, especially their legal position, is among the most searching tests of the level of civilization attained by a society. It is better for those who have almost unlimited power of government in their hands to err on the side of freedom. We have enjoyed so much freedom for so long that we are perhaps in danger of forgetting how much blood it cost to establish the Bill of Rights."

We respectfully submit that this is a case squarely within that concept of the Bill of Rights which was enunciated by President James Madison, who was one of its authors and protagonists. He declared:

> "The Bill of Rights is not a grant of privileges handed down to them (the people) by the government, but rather it is a curb and restriction laid upon government by the people. The Bill of Rights, we must remember always, is an instrument. It must be wielded and cared for by each generation."

The undersigned submit this brief in the profound conviction that decision of the present case is one of the most momentous constitutional responsibilities which has ever been thrust upon this Court.

Presented for this Court's decision is the constitutional validity of the Subversive Activities Control Act of 1950.

This, of course, is the short title which Congress has assigned to those provisions of the Internal Security Act of 1950, consituting Title I of that act, as amended which undertake to define "Communist-action," "Communist-front," and "Communist-infiltrated" organizations, impose a variety of sanctions on such organizations and their members, which set up procedures and a tribunal by which any voluntary association of private citizens in the United States can be subjected to a political trial, and which impose on the tribunal created to hold such trials a significant series of prejudgments.

This act we believe, and will try to demonstrate more fully below, has two principal features. The first is that it imposes penalties and civil disabilities on American Communists, designed to destroy their movement as completely as possible, not for plotting violent revolution, not even for "advocating" it, not for anything they are found guilty of having done or said, not even for being "foreign agents," as that term is ordinarily understood, but simply for being associated with Communists of other countries in an international movement and for sharing the ideas of Communists of other countries, especially, of course, those of the Communist Party of the Soviet Union.

Since this aspect of the Act will be argued to the Court by parties to the record, we will focus our attention chiefly on the Act's second principal feature. *This is that it represses the organizational activities of non-Communist Americans whenever they are found to have associated with Communists for any purpose, however innocent, to have collaborated with Communists for the attainment of any objective, however lawful and proper, or to have agreed with Communists concerning ideas and policies, even though the points of agreement may have been very remote indeed from the particular ideas and policies for which the Communists are assertedly condemned.*

This, it seems to us, is nothing less than the legislation of a new orthodoxy. It is an orthodoxy of non-association with any person who is, or might become suspect, of non-participation in the affairs of any organization which espouses, or might espouse, controversial views. Above all, it is an orthodoxy of non-deviation from the policies and proposals of those who, on any issue, most loudly and successfully contend that whoever does not agree with them must agree with the Communists and hence must be pro-Communist. This would indeed produce the unanimity of the graveyard. *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 641.

The great controversial issues of the day—the very issues on which we stand most in need of free, fearless, and uninhibited discussion—are characteristically two-sided issues. There are conscientious Americans on both sides of each of them. In conformity with our traditions, we cannot assume that either side has acquired a monopoly of truth or that the other has nothing to say which it would be to our benefit to hear.

On each of these questions, as the record in this case demonstrates, the Communist Party has taken, or is likely to take a position. The Court of Appeals found the ultimate Communist aim to be a stateless and classless world. However visionary, this is not an illegal or immoral objective. The opinion shows that Communists have many objectives and policies. Its immediate objectives include maintaining peace. A religious or peace organization which approved the results of the Geneva conference and urged further efforts toward ending the cold war would be supporting a Communist objective. Statements which are lawful for the President of the United States or the National Council of Churches to make may become evidence as furthering Communist objectives if made by lesser people. By the reasoning which underlies this Act, the side for which Communists express a preference becomes thereby the Communist side. The organizations on that side must

thenceforth change their views, disband, or risk being required to stand trial before the Subversive Activities Control Board on a charge of "non-deviation."

As Professor Zechariah Chafee, Jr., possibly our outstanding authority on freedom of speech, has so aptly demonstrated, the effect of this Act is thus to deny organized expression to one side, but not the other, on each of the great debates of the day (63 Harvard Law Review 1382). In our complexly interlocking society, exposed daily and hourly to the opinion-shaping influence of press, radio, television and other mass communication media, the idea which is denied organized expression, while its rival enjoys these advantages, has no chance in the market place, whatever its intrinsic merit. The practical effect, therefore, is to suppress one side of each these questions and erect the other into a semi-official compulsory creed.

This is no chimera, for already the forces which produced this Act have carried us far along that road. Already, on many of the issues of the day, we have seen beginning to develop a safe and orthodox side, which the prudent espouse out of prudence with little examination, and a dangerous and "subversive" side, which only the bold care to listen to, read or examine. Just at the moment when this tendency is, happily, beginning to subside, this Act, if the Court upholds it, will freeze that tendency and convert it into an institution.

The Congress which adopted this Act thereby expressed its understanding that the current danger to our institutions is that the American people will take ideas at their face value and judge them on their merits, instead of on the political backgrounds of those who put them forth. This indiscretion, the Act seems to say, may cause them to be lured by handsome strangers with no security clearance into dark byways where they will be seduced by false doctrines and persuaded to betray their country.

We submit that, not only is this opinion without rational foundation, but that even its irrational foundation has long since passed away. The real and present danger is that the sudden rise in the world of a powerful ideology, rival to our own, and the fears, hatreds, frustrations and confusions generated by this unexpected and unexplained phenomenon, may cause us to lose sight of the meaning of our own heritage and to destroy it in the name of defending it. This Act, we feel, brings precisely that danger to a profound crisis, perhaps to a turning point.

This danger threatens loss of liberty more gravely and more imminently than any minority political movement could ever threaten it. The danger, however, may not be limited to loss of liberty. Involved also is the fact that we are being urged—and, by this Act, compelled—to stake our survival on methods which history has shown have little survival value. We are asked to meet the challenge of the rival world ideology by becoming rigid and unbending, although history has shown that societies which cannot bend are not so much strong as brittle. We are urged to close ranks around our own ideology by adopting a coerced conformity. Yet the principal result of coerced conformity in other countries has been to destroy the delicate and complex machinery by which the mistakes which fallible leaders and statesmen must necessarily make can be detected and corrected before it is too late. We submit that the world of 1955 is not one in which even the world's strongest country should risk walking blindfolded.

It is with these considerations in mind that we respectfully submit, for the Court's consideration, the following brief.

ARGUMENT

I. The Act is unconstitutional as an overhanging threat to the exercise of rights protected by the First Amendment.

We think it unnecessary to dwell at length on a demonstration that, whatever conduct is reached by this Act is not merely regulated, but is penalized most severely—one might even say savagely.

Affected organizations are compelled to publish, when they publish anything, an estimate of themselves which, in the context of our time, must necessarily do them incalculable damage (Sec. 10). They are required to publish this in a form which resembles, as much as possible, a voluntary declaration representing their own opinion of their nature and purpose. Yet it may well amount to compulsory self-defamation, since those who believe in the organization and desire to see it continued may very well be the ones who stubbornly refuse to share the Board's opinion that it is "a Communist organization." Whether they share it or not, they are required to express it or be silent altogether, under extremely heavy criminal penalties (Sec. 15(c)). They are even required to express this opinion in a manner (putting it on the outside wrapper, as well as on the material itself) which could not conceivably serve any function or purpose except to frighten recipients into requesting that their names be removed from the mailing list.

If an organization which has fallen under the Board's ban desires to publish any opinion whatever, however moderate and reasoned, on any subject whatever, from social security to what ought to be done about the hydrogen bomb, it cannot do so without attaching to that opinion a label. This label, whether justifiably or not, will be widely understood as a declaration that the enclosure is Communist propaganda and that social security (or whatever

the organization desires to advocate) is "Communistic." That a given program is "Communistic" is typically the view, not of organizations formed to promote the program, but of the program's most fiery and irreconcilable opponents. Yet, in effect, it is *this* view, not its own, which the organization is required to publish—or be silent.

The labeling provisions of the Act are closely analogous to the device of compulsory arm-band identification, to which this Court has had occasion to refer. *American Communications Ass'n* v. *Douds*, 339 U. S. 382, 402. Professor Chafee has aptly said of them, before they were brought forward from the Mundt-Nixon Bill into the present Act: "This novel stigma recalls the practice of medieval princes to require Jews to wear special marks on their coats" (63 Harv. L. Rev. 1382, 1384).

Solely for their membership in disapproved organizations, the Act bars an incalculable number of persons from employment by the government, by a "defense facility," or by a labor union (Sec. 5). The government is already our largest employer. Production in any major industry might effect the nation's ability to defend itself. Thus the doors close automatically to an enormous fraction of the labor market. If the term "defense facility" is broadly interpreted this fraction can be expanded to cover very nearly the whole of it. It must be remembered also that many of the persons affected will be dependent for employment on special skills, knowledge or experience for which there is no demand outside the closed area. This is punishment of a most severe kind. *U. S. v. Lovett*, 328 U. S. 303. It is a proscription many times more sweeping than that involved in *Ex parte Garland*, 4 Wall. 333, and *Cummings* v. *Missouri*, 4 Wall. 277.

We put to one side as of little practical importance the distinction between members of "Communist-action" organizations, who are prohibited from accepting or retaining employment in a defense facility, and members of "Communist-front" organizations who, "in seeking, accept-

ing, or holding" such employment, must not "fail to disclose" their membership. The distinction is without a difference under the circumstances. If the atmosphere were such that the employee could entertain substantial hope of being employed despite such a revelation, the Act would not have been passed.

It is true that the sanctions discussed above are apparently inapplicable to "Communist-infiltrated" organizations, since the Act does not require the latter to register. However, the face of the Act makes it plain that the "Communist-infiltrated" category is aimed primarily, if not exclusively, at unions. Unions found to fit this category are subjected to virtual outlawry, since they are forbidden to carry on the most important functions which a union exists to fulfill (Sec. 13A(h)) and procedures obviously aimed at their displacement by rival organizations are set up (Sec. 13A(j)). Nor are we told by what means the organizations are supposed to find out whether there is Communist infiltration. Are they supposed to conduct internal witch hunts when even Congressional Committees armed with the powers of subpoena have found such difficulty in sifting fact from fancy in this area?

This Court has already recognized that, even without such sanctions, an official governmental designation of an organization as subversive severely cripples, if it does not proscribe it. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123. The designation plus the sanction plainly attains the level of proscription by indirection. Even the majority opinion upholding the Act in the court below concedes that "realistically" the registration and accompanying sanctions will restrict freedom of expression (Op. p. 11). Somewhat more realistically, Professor Chafee has concluded with regard to provisions of the Mundt-Nixon Bill which have been brought forward (and even somewhat added to) in the Act: "All this virtually outlaws whatever organizations the [members of the Board] object to." 63

Harv. L. Rev. 1382, 1384. Yet it has frequently been noted by commentators on the operation of the American political system that our democracy has functioned through and been vitalized by voluntary association. As Professor Henry Steele Commager of Columbia University put it: "Most of our major reforms, political, social, moral were carried through by voluntary political associations. * * * Once the notion that joining may be dangerous is firmly established, all our organizations will be affected, and the American democracy will dry up at the roots." New York Times Magazine, November 8, 1953.

Most of these reforms were opposed as evil, socialistic or subversive. As Reverend Samuel J. May said of the abolitionists: "We are what we are * * *. It is unbecoming in abler men who stood by and would do nothing, to complain because we do not do better."

Congress itself has impliedly recognized right in the text of the Act that it was known to have, and intended to have, a highly penal effect. It is provided that the names of individuals shall not be published until they have had notice and an opportunity to deny the organizational connection. Sec. 9(b). An elaborate procedure is set up by which those able to prove non-membership in the affected organizations can get their names struck from the official blacklist. Secs. 7(g), 13(b), 13(i), 14(a). If the Act were genuinely regulatory, rather than punitive in substance and intent, such provisions would not have been thought necessary—or even thought of at all.

The real meaning of the Act is thus to be found in the conduct which organizations and individuals must forego in order to feel some assurance that these penalties will not be applied to them. We submit that the Act's standards are so vague, and their application so necessarily subjective, that no precaution can give entire assurance. However, the best hint as to what prudence requires is that given by Sec. 13(f)(4):

(f) In determining whether any organization is a "Communist-front organization," the Board shall take into consideration . . .

(4) the extent to which the positions taken or advanced by it from time to time on matters of policy do not deviate from those of any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2.

As we pointed out in our opening remarks, and as this record amply discloses, the Communist Party takes a position on a vast variety of issues which have no apparent connection with communism, indeed, on virtually every issue which is the subject of current debate. *Since an organization cannot know in advance what "extent of non-deviation" will seem significant to the Board, its only safe course is total deviation. The prudent organization, confronted with an issue, must resolve it by finding out what the Communist Party position is and then endorsing its opposite, whether or not that opposite seems to have any intrinsic merit.*

Even this may not be quite enough. The Communist Party line is subject to sudden and drastic changes—or, at least, so we have often been told. The Board, in applying the similar non-deviation test of section 13(e)(2), found that parallel statements by Russian and American Communists were equally significant to show domination of the latter by the former, regardless of which came first in point of time. It seems, therefore, that even after the prudent organization has established with reasonable certainty that a proposed policy is not now the Communist position, it still may not be a safe policy to espouse—the Communists might endorse it later.

What this boils down to, as a practical matter, is that the prudent organization will take no position on any controversial issue which might offend the powerful, and the prudent individual will neither join or contribute to any.

organization which has ever taken such a position or which might conceivably do so in the future. Thus the Act, as Professor Chafee has pointed out (63 Harv. L. Rev. 1382, 1384), interferes "by law with freedom of discussion through organizations" and "proposes to twist out of all recognizable shape one of the leading traditions of American life: the possibility of freely forming associations for all sorts of purposes—religious, political, social and economic."

We realize that it may be argued that some of these questions are premature in the present proceeding, since the petitioner in this case, the Communist Party, is not charged with being a "Communist-front," nor does it, we assume, deny that it is in some sense of the term, a "Communist organization." We submit, however, that the Act's validity must be decided in the light of its total impact on American freedom. That total impact is not limited by the details of this, or any particular, proceeding. *Thornhill* v. *Alabama*, 310 U. S. 88, 97. It is defined rather by the scope of the potential danger arising from the Act which an organization must assess before espousing any policy and which an individual must assess before venturing to join an organization. This total impact can be determined only by examining the pattern of the Act as a whole.

Such an examination is also appropriate in this proceeding for other reasons:

First: The primary impact of the Act is not on the Communist Party, but on mixed organizations including non-Communist members.

This fact is evident from the structure of the Act itself. The Board is created and staffed as a permanent organization; yet it can try the Communist Party only once and then devote the rest of its existence to other organizations. It is plain, also, that the trial of the Communist Party can only come first. The definitions of the Act are such, Sections 3(4) and 3(4A), that no organization can well be-

accused of being a "front" or of being "infiltrated," unless the Communist Party has first been tried and condemned. The Attorney General has so construed them in action by deferring his first group of front petitions until a few days after the Board issued its order in the present case.

It is also evident from the Act's setting, both legal and practical. If the findings of Section 2 are assumed to be correct, no new legislation was necessary to impose registration requirements on the Communist Party—it was already subject to registration requirements under both the Voorhis Act, 18 U. S. C. 2386, and the McCormack Act, 22 U. S. C. 611 et seq. Furthermore, Congress has rendered the Board's trial of the Communist Party perfunctory in advance by deciding that "*the* Communist organization in the United States," which could only refer to the Communist Party, constitutes "a clear and present danger." Sec. 2(15) (emphasis added). It has been rendered even more perfunctory in retrospect by Section 4 of the Communist Control Act of 1954, 68 Stat. 775 et seq., which specifically identifies the Communist Party as a Communist-action organization.

Moreover, the Board is not likely to have the independence required for judicial decision. In Collier's magazine for September 2, 1955, Hon. Harry P. Cain, a member of the Board, is quoted as saying that the President's secretary told him "This is a team and you're expected to play on it", and a high official of the Justice Department is quoted as saying that former Senator Cain should have resigned from the Board before criticizing the Justice Department. Whether or not these quotations are accurate it seems evident that the Board is more subject to political and public pressure than is a court of law.

All of this taken together makes it very plain that the primary function of the Act under review, in law as well as in fact, is not to subject the petitioner to sanctions, but to serve as a foundation for charges brought against other organizations.

Second: The primary impact of the Act is on organizations a substantial number of whose members are neither Communists nor Communist sympathizers.

Conceivably, the term, "Communist-front," might be applied to an organization made up entirely of Communists, but which does not proclaim that to be the fact. The Act makes it evident that this is not what Congress had in mind. Section 13(f) does not require or provide for proof that a majority, or even a substantial minority of the members are Communists. The findings in Section 2(7) speak of "fronts" as being "created and maintained, or used, in such manner as to conceal the facts as to their true character and purposes and their membership," and asserts that they are able to obtain "support from persons who would not extend such support if they knew the true purposes * * *." It is evident that what Congress is concerned about here is that organizations under some degree of Communist influence are able to attract and to retain as members a substantial number of persons who are neither Communists nor Communist sympathizers. The further assumption seems to be that Communists are such super-men and non-Communists such weaklings that the thinking and point of view of the Communists, even if they be in a minority, will prevail and dominate the policies and actions of the organization. This is not only guilt by association in crassest form—it is pernicious nonsense.

In the case of "Communist-infiltrated" organizations, the very name implies that the membership is chiefly non-Communist.

Third: The primary impact of the Act on a mixed organization is not on the Communist members, but on the non-Communist members.

This fact, we think, is plainly evident. The citation of a mixed organization before the Board can mean little or nothing to the Communist members, as individuals. It threatens them with no penalty to which they are not al-

ready subject. By contrast, its impact on the non-Communist members is enormous. It threatens them with being transformed, at a single stroke, from first class citizens into persons classified inferentially as spies by their automatic ineligibility for a passport, and as saboteurs by their blank proscription from government, labor union or defense industry employment.

Fourth: The inhibitory effect of the Act on freedom of expression operates primarily not on insurrectionary ideas, but on non-insurrectionary ideas.

This, we think, is also very plain. When this Act was proposed, the expression of insurrectionary ideas was already fully and exhaustively dealt with in the Smith Act, 18 U. S. C. 2385, and by the concept of conspiracy to violate the Smith Act. *Dennis* v. *United States*, 341 U. S. 494. *Obviously, therefore, it represents a Congressional judgment that activities which the Smith Act failed to reach should also be brought under control. This could only be the expression of ideas condemned not because of their insurrectionary nature, which would bring them within the purview of the Smith Act, but simply because they have Communist support.*

Taking all these factors into consideration, we think it very evident that the validity of the Act should be determined in this proceeding not by its impact on the petitioner, but by its impact on American civil liberties. *Thornhill* v. *Alabama, supra; Lovell* v. *Griffin*, 303 U. S. 444, 451, 453. If the Act fails for this reason, then it becomes immaterial whether Congress could validly have reached some activities of petitioner under a more narrowly drawn statute. *Reese* v. *United States*, 92 U. S. 214; *James* v. *Bowman*, 190 U. S. 127; *Winters* v. *New York*, 333 U. S. 507.

Taking the impact of the Act as a whole, it is clear that its vagueness and breadth make it invalid by bringing within the scope of its repressive effect much constitutionally protected conduct. *Stromberg* v. *California*, 283 U. S. 359;

Herndon v. *Lowry*, 301 U. S. 242; *Winters* v. *New York*, 333 U. S. 507.

It is a statute in which vague and fluid words set a trap for the innocent. *United States* v. *Cardiff*, 344 U. S. 174, 176-7. It exacts "obedience to a rule or standard . . . so vague and indefinite as really to be no rule or standard at all." *Small* v. *American Sugar Refining Co.*, 267 U. S. 233, 239. It is a prime example of that type of statute concerning which it has been well said that:

> Definiteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense. Winters v. New York, 333 U. S. 507, 540 (Frankfurter, J. dissenting).

It acts as an overhanging threat to, and therefore as a prior restraint of, the free dissemination of ideas. *Thornhill* v. *Alabama*, 310 U. S. 88, 101-102; *Follett* v. *McCormick*, 321 U. S. 573, 575; *Cantwell* v. *Conn.*, 310 U. S. 296, 306.

It authorizes a Board of five men to sit in judgment on organizations, to determine that some are deserving and others are not, to permit deserving organizations free access to the market place of ideas, to deny access, except at the price of crippling restraints, to those deemed non-deserving. It is thus, in the substance although not in form, a statute which provides for the licensing of expressions of opinion and which confers broad discretion on the licensing officials. Such statutes are invalid on their face. *Schneider* v. *State*, 308 U. S. 147; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Largent* v. *Texas*, 318 U. S. 418.

II. The Act is unconstitutional because it rests on findings which are beyond congressional power.

A. It is beyond congressional power to declare that the dissemination of non-dangerous ideas should be repressed because the disseminators are connected with a dangerous movement.

Congress, understandably dubious of its power to enact the statute, has attempted to bolster that power by reciting that: "The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger * * *."

Congress, we submit, has no such authority. The existence of a clear and present danger which would, under the decisions of this Court, justify an abridgment of freedom of expression has been recently ruled to be a question of law, to be decided by a court. *Dennis* v. *United States*, 341 U. S. 494. Congress, of course, can make law within the limits of its legislative authority. It cannot decide questions of law, arising out of particular facts, in such a way as to make its decision binding on a court.

Furthermore, Congress cannot lift itself by its own boot straps; it cannot legislate its own powers. Consequently, when the constitutional validity of a statute abridging personal and political freedoms depends on a finding, it necessarily follows that that finding, whether of fact or law, cannot be made by the Congress. Cf. *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 638, 640; *Thomas* v. *Collins*, 323 U. S. 516, 529-30; *Thornhill* v. *Alabama*, 310 U. S. 88, 96; *Herndon* v. *Lowry*, 301 U. S. 242, 258.

The opposite result would virtually destroy our device of a written constitution and substitute legislative supremacy. If Congress can render an invalid statute valid by reciting that it finds the facts to be such as would render it

necessary, then nullification of First Amendment guarantees, and of any or all constitutional guarantees, is no more than a drafting problem.

If Congress can do what it has done here, it could also "investigate" the "Protocols of Zion," draft an appropriate set of findings, and proceed to restore all the civil disabilities to which Jews were once subject. See Wormuth, *Legislative Qualifications as Bills of Attainder,* 4 Vanderbilt Law Rev. 603, 616. As a matter of fact, in an atmosphere of anti-Semitic excitement, comparable to the atmosphere of anti-Communist excitement which prevailed in 1950 when this Act was passed, it is easily conceivable that such findings might be rendered. It is also easily conceivable that they might be supported by substantial evidence in the investigative record, since in such an atmosphere there would always be witnesses willing, for self-interest or even for a flattering spotlight, to cater to and inflame the current passion.

The position of the court below that Congressional findings are conclusive when they deal with a matter within the general scope of Congressional power, and are rendered after "extensive investigation" (Op. pp. 55-6), is untenable for several other reasons. Cf. *Chastleton Corp.* v. *Sinclair,* 264 U. S. 543.

The findings of Section 2 deal principally with the nature and historic significance of the "world Communist movement," with the nature of the governments of foreign countries in which that movement has come to power, and with the intentions of those governments toward the governments of non-Communist countries including our own. The conclusion is that we cannot co-exist with those of our own citizens who are Communists, yet this conclusion is little more than an inference derived from the almost explicit assumption that we cannot co-exist with "the Communist dictatorship of a foreign country," in which "the direction and control of the world Communist movement is vested . . . ." *These findings thus have their roots in judgments*

in the field of international relations. This is a field which the Constitution entrusts almost entirely to the executive branch of the government. It is interesting to note that the executive branch has recently come to the conclusion that co-existence with Communist countries is possible and desirable and that it is now in process of being sought—conclusions which contradict the most basic assumptions and attitudes from which the findings of Section 2 were reached.

The findings of Section 2 deal with complex and emotionally surcharged relationships between people and between institutions and movements composed of people. If an evaluation and interpretation of such relationships can be said to be a "fact" at all, it is at most a very relative, conditional and unstable fact. Developments of the last few months indicate that these relationships are beginning to undergo a profound change. For this reason alone, the position of the Court of Appeals that it is legally bound to assume that the fears expressed by Congress in 1950 provide an adequate, complete and conclusive picture of current reality, is unreasonable, if not wholly irrational. Cf. *Dennis* v. *United States*, 341 U. S. 494, 581 (Black, J., dissenting); see *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543, 547-8.

The finding, in any case, is not a constitutional clear and present danger finding. The constitutional test has always been whether *the particular statements which are being suppressed* give rise to a clear and present danger of substantive evils which Congress has a right to prevent. *Schenck* v. *United States*, 249 U. S. 47. *It is a vastly and fundamentally different thing to say that expressions of opinion which have no inherent tendency to bring about any evil can be suppressed because of the dangerous character of the speaker, or even because of the speaker's affiliation with a dangerous movement.* Despite the use of the phrase "clear and present danger", this goes back to, and even beyond, the old "bad tendency" test. Even the discredited

"bad tendency" test at least purported to find the tendency in the speech, not in the speaker's political dossier.

It is not the law that the peaceful advocacy of lawful change can be suppressed or penalized because of the participation, influence or sponsorship of revolutionists. *De Jonge* v. *Oregon*, 299 U. S. 353.

B. It is beyond congressional power to find that a specified group, association or movement, whether identified by name or by description, is engaging in proscribed activity.

The findings included in Section 2 include a "purpose" to use treachery, deceit, infiltration, espionage, sabotage and terrorism. Subdiv. (1). The Board purports, in this proceeding, to have conducted an impartial trial of the question whether American Communists are foreign agents, yet the trial is held under an Act in which Congress instructs the Board at considerable length about the relations between American Communists and the world Communist movement. Subdivs. 4, 5, 6, 8, 9, 12. It is found in subdiv. (6) that American Communists are endeavoring to overthrow the government by force and in subdiv. (9) that they have repudiated their allegiance to this country. In subdiv. (11) Congress reveals that Communists are engaged in committing espionage and sabotage so cleverly that the government is unable to prove it.

These are findings of guilt and, to a considerable extent, of criminal guilt. They amount to verdicts, rendered against each and every member of the Communist Party, finding them each guilty of a considerable variety of serious felonies, including Smith Act violations and conspiracies to incite rebellion or insurrection, to overthrow the government by force, to commit espionage, to commit sabotage. They are also, in effect, findings that the leaders of the Communist Party are criminally liable for failure to register it under the Voorhis and McCormack Acts, supra, although the government has had ample opportunity to indict them on such a charge and has never seen fit to do so.

The power to render findings of personal guilt is one so delicate, so easily subject to abuse, that the framers of our Bill of Rights devised for it a whole interlocking system of limitations and safeguards. Among these are the sifting of accusations by grand juries in order to protect the accused from the injury of unsubstantiated charges, the right to know the nature and cause of the accusation, to confront and cross-examine adverse witnesses, to subpoena and present defense witnesses, to be tried by jury, to be heard by counsel in his own defense before the verdict is rendered. All these laboriously constructed safeguards are automatically swept aside when Congress conducts the trial and renders the verdict in the form of "findings" attached to an enactment.

We think that the basic reasons why bills of attainder are constitutionally prohibited is that the legislative process does not permit of adequate guarantees that such questions will be decided justly. We also think that Section 2 of the Act is in substance a gigantic bill of attainder in which thousands of individuals have been simultaneously adjudged guilty of serious offenses. *United States* v. *Lovett*, 328 U. S. 303; *Cummings* v. *Missouri*, 4 Wall. 277; *Ex parte Garland*, 4 Wall. 333.

The fact that the verdict is rendered against all members of a group, instead of against named individuals, does not render the finding more legislative in character. *Rather, it shows that Congress has undertaken to convict not only those individuals against whom it has heard evidence, but also many thousands of others concerning whom, as individuals, no evidence whatsoever was produced. This merely complicates the abuses which the framers of the Constitution feared in legislative trials by adding to them a still further abuse.*

The purely verbal trick of substituting "the Communist movement in the United States" and "the Communist organization in the United States" for the name, "Communist

Party of the United States," is a disguise so paper-thin that it would be unworthy of comment but for the fact that it shows Congress' awareness that it was attempting, in Section 2, something which would be held unconstitutional if done too openly. It is otherwise without significance. The great constitutional guarantees deal with substance, not form.

It is true that, if we are right in our view that there is a fundamental constitutional principle that questions of guilt must be decided by the judicial process, then this Court's decision in *American Communications Association* v. *Douds*, 339 U. S. 382, must be regarded as a departure from that principle. Yet even that case, which we think the Court will ultimately find it necessary to reconsider, is very far from providing any precedent for the upholding of the present Act. On the contrary, that case is specifically limited to situations where the penal effect on the individuals involved is slight, the number of individuals affected is small, and all of them are regarded as occupying strategic positions from which they can affect the flow of commerce. It was only because of those limitations that the Act there under consideration was upheld. In this case, as we have attempted to demonstrate under Point I, the penal effect is extremely severe, the number of individuals affected is enormous, and they are affected despite the fact that they may occupy positions of very minor importance, or none at all. Also, Section 2 of this Act undertakes to find its myriad defendants guilty of much more serious offenses than a tendency to indulge in political strikes. Even the *Douds* case, far from justifying the present Act, contains many indications by way of dicta that what has been here attempted would be invalid.

C. It is beyond congressional power to evaluate political movements, pronounce them safe or dangerous, or to decide the relative merits of alternative forms of government.

With its findings of guilt Section 2 mingles political interpretations and evaluations. It deals with the "purpose" and "nature" of the Communist movement. It pronounces on the desirability of Communism as a system of government. Subdivs. (2) and (3). It pronounces Communism as a political movement or tendency to be a dangerous aberration, which the government, subdiv. (15), must undertake to frustrate. It rules that Communist organizations, although they may "designate themselves as political parties," are "in fact" not political parties. Subdiv. (6).

Even those who wholeheartedly agree with all the political judgments embodied in Section 2 should recognize that a body competent to reach them, *not as personal opinions but with official finality,* must necessarily be equally competent to determine, if it should ever be so inclined, that the Democratic Party should be suppressed because it is "in fact" a plot to bankrupt the country and disrupt the national economy, or the Republican Party because it is "in fact" nothing but a subservient tool of private corporate greed.

We submit that the First Amendment was adopted precisely to prevent governmental findings on such questions. Indeed, in the field of political liberty, the First Amendment could serve no other practical purpose. No constitutional limitations are needed to prevent governments from suppressing views which those in power *do not* consider dangerous and unwholesome.

It is not the function of the Congress to decide whether a form of government is good or bad, whether a political movement is a danger or a promise, whether a political theory is true or false. It is not its function to decide that

persons who "designate themselves as political parties" should be denied the right to offer, endorse and oppose candidates, publish political platforms, support and oppose legislation, etc., because Congress disbelieves their political representations.

These are not questions of fact but questions of political evaluation. Their decision is an exercise, not of the delegated powers committed to a representative government, but of the ultimate powers reserved to a self-governing people. The power of determining such questions is withheld from the Congress by the First Amendment and reserved to the people by the Ninth and Tenth.

D. The findings are not severable.

The opinions which Congress has expressed in Section 2 constitute the foundation on which the Act's whole structure is erected. The definitions in Section 3 of "Communist-action", "Communist-front", and "Communist-infiltrated" organizations are expressed in terms of the findings. Without the definitions and the findings on which they rest, the remainder of the "Subversive Activities Control Act of 1950," as amended, has nothing on which to operate.

Hence, in this instance, despite the presence of a severability clause, the fact that the findings are beyond Congressional power necessarily invalidates the Act as a whole.

III. The Act is unconstitutional because it authorizes ideological trials and penalizes beliefs, opinions and attitudes, not evidenced by overt acts.

A. The Act authorizes ideological trials.

The danger of any insurrectionary activity, we learn from Section 2 (15), is dependent on certain conditions precedent. There must first arise "a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial

straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement * * *." These, obviously, are remote, and entirely hypothetical circumstances, which may never arise at all. Yet without them, not even an unsuccessful insurrectionary attempt is predicted. For the present and the predictable future, "the Communist movement * * * seeks converts * * * by * * * schooling and indoctrination."

It is also interesting to note that Congress has not thought it necessary to require that condemned organizations report on whether they possess arms, ammunition or explosives, nor even on their resources in the way of short-wave apparatus, cloaks, daggers and supplies of invisible ink. It has, however, required:

> "A listing, in such form and detail as the Attorney General shall by regulation prescribe, of all printing presses and machines including but not limited to rotary presses, flatbed cylinder presses, platen presses, lithographs, offsets, photo-offsets, mimeograph machines, multigraph machines, duplicating machines, ditto machines, linotype machines, intertype machines, monotype machines, and all other types of printing presses, typesetting machines or any mechanical devices used or intended to be used, or capable of being used to produce or publish printed matter or material, which are in the possession, custody, ownership, or control of the Communist-action or Communist-front organization or its officers, members, affiliates, associates, group, or groups in which the Communist-action or Communist-front organization, its officers or members have an interest." Sec. 7 (d) (6).

This section, although not part of the original Act but added by a later amendment, may be said to speak for itself as a Congressional construction of the nature of the "clear and present danger."

The Act's instructions to the Board as to the matters it shall "take into consideration" set the stage for an ideological trial by their heavy stress on parallelism in views

and policies and on the subjective state of mind to be attributed to members or leaders of the accused organizations. This stress is matched by the Act's complete failure to require proof of any objective facts adequate to the determination of issues to which grave legal consequences have been attached.

Space does not permit a detailed analysis of the Board's voluminous report, yet we nevertheless submit that a close and critical analysis of that document, in particular its processes of inference, will make it clear that the abuses which the Act so obviously invites have in fact occurred.

A glance at the report is sufficient to make clear that references to historical works on Communist theory written by Europeans since deceased are enormously more numerous and have much greater bearing on the Board's conclusions than references to overt conduct found to have been engaged in by petitioner. By this method of reasoning the Board would be competent, if it should ever be so inclined, to proscribe the Democratic Party on the basis that Jefferson and Madison advocated revolution under certain conditions or the Republican Party on the basis of similar statements of Lincoln and Grant. See footnote to Opinion of Justice Jackson in *American Communications Association* v. *Douds* (supra), p. 440. On closer examination of the reasoning process, it becomes evident that the Board has not looked to petitioner's conduct as a test of what it really believes. On the contrary, it has started by attributing its own version of the theory to petitioner and then used this as a basis for inferring the significance and motivation of petitioner's conduct. Compare *Schneiderman* v. *United States*, 320 U. S. 118, 158-9. For example, when it wishes to know whether the Communist Party, despite its denials, intends to undertake violent revolution in the United States, the Board does not inquire whether the matter can be tested objectively, for example, by inquiring whether overt preparations for such an undertaking, such as military drills and the accumulation of secret arms

caches, have taken place. Instead, it looks to see what Lenin said about it.

In short, the Board has not tried the Communist Party. It has tried and condemned "Marxism-Leninism".

This process reaches its grotesque climax in the Board's finding that "Marxism-Leninism * * * has been promulgated and issued by the Soviet Union as the overall philosophy, authoritative rules, directives and instructions governing the world Communist movement" (p. 78) and that "the Marxist-Leninist classics are one of the chief means by which the Communist Party of the Soviet Union directs, dominates, and controls the Communist Party of the United States" (p. 43).

Thus, according to the Board's theory, if an American reads the "Communist Manifesto," a work written in England by German refugees more than half a century before the Russian revolution, and if he finds it convincing and adopts its ideas as his own, he thereby becomes *ipso facto* a Russian agent and falls under the sway of Russian Communist leaders who are "controlling and dominating" him through the medium of the book. This is witch-hunting at its weirdest.

B. The Act penalizes beliefs

Under Point I we have discussed the sanctions of the Act and what is said there need not be repeated. At this point, we wish merely to take note that some, at least, of these sanctions permit of only two interpretations. Either they are penalties imposed for the mere holding of a belief or they are conclusive presumptions, drawn from the mere fact of belief, that the individual involved is disposed to commit offenses which he is not shown ever to have committed.

For example, the Act subjects any member of an organization ordered to register to a penalty of $10,000 fine and

five years imprisonment, Sec. 15 (c), for the offense of applying for, using or attempting to use a passport. Sec. 6(a). No showing is required that the passport was used or intended for any improper purpose. Unless the intention is purely punitive, it must embody an implied Congressional judgment that *all* members of the Communist Party and *all* members of *all* "Communist-front" organizations are unfit to be trusted with passports. The Act contains nothing to explain or illuminate such a judgment, except the statement in Section 2 (8) that "travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement."

Yet the Act does not require a scintilla of proof that the individual denied a passport has ever served as an international courier or evinced any willingness to do so. It makes no provision for the consideration of affirmative proof as to why he needs to go abroad or what he intends to do. It does not permit the issuing officer to find that any combination of facts whatever outweigh the bare fact of an organizational membership. Indeed, it makes the officer guilty of a crime if he issues the passport with knowledge or "reason to believe" that the applicant is a member. If the right to a passport has in fact been cut off, not to punish the individual, but because of a supposed probability that he will serve as an international courier, then that probability has been conclusively presumed from the individual's supposed beliefs, attitudes and loyalties. Even the latter are inferred from the bare fact of membership and, in the case of a non-Communist member of a "front," from the bare fact of association. It will be a brave official indeed who will not resolve every doubt against an applicant.

Similarly, the Act conclusively presumes unfitness for government employment without proof of any disloyal act and for labor union employment without proof of any participation in a political strike.

Let us suppose the case of a skilled worker who has been in a defense industry for twenty years and for all that time has been a trusted and satisfactory employee. No job he worked on has ever been sabotaged. Now it develops that he must be banned from his present job, and from all defense industry, because of membership in an organization. Is this because he might commit sabotage? If so, why is the line of reasoning from his membership to his beliefs to his probable future conduct—an inference on an inference, winding up with a prediction—so compelling that his contrary record on the specific issue cannot even be taken into consideration?

The pretense that we are not punishing the heretic for his opinions, but are only guarding against the misconduct which his opinions might lead him to commit, is the most ancient and threadbare rationalization of persecution. It is the very hallmark of bigotry. It was used for centuries by Catholics to justify the imposition of disabilities on Protestants. Protestants, when they came to power, imposed similar disabilities on Catholics and offered the same excuse. Both used it to defend and explain discrimination against the Jews. Why should such a hoary pretext for intolerance rise to haunt the United States in mid-Twentieth Century?

Lord Macaulay wrote more than a century ago:

> "It is altogether impossible to reason from the opinions which a man professes to his feelings and his actions; and in fact no person is ever such a fool as to reason thus, except when he wants a pretext for persecuting his neighbors" (Historical Essays, London, 1932, p. 92).
>
> "If such arguments are to pass current, it will be easy to prove that there was never such a thing as religious persecution since the creation. For there never was a religious persecution in which some odious crime was not, justly or unjustly, said to be obviously deducible from the doctrines of the persecuted party . . .

The true distinction is perfectly obvious. To punish a man because he has committed a crime, or because he is believed, though unjustly, to have committed a crime, is not persecution. To punish a man, because we infer from the nature of some doctrine which he holds, or from the conduct of other persons who hold the same doctrines with him, that he will commit a crime, is persecution, and is, in every case, wicked and foolish" (Ibid, pp. 7-8). (Emphasis supplied.)

IV. There is now no clear and present danger which would justify such an invasion of rights protected by the First Amendment as the Act under review makes.

This Court in upholding the Smith Act in *United States* v. *Dennis* (supra) weighed the probable danger to our national security from the Communist conspiracy, which had been found by the court below to exist, against the danger from the invasion of free speech and association and upheld the Smith Act as applied in that case on the probability of danger from the conspiracy to advocate the overthrow of government being greater than the danger from the curtailment of the protection of the First Amendment. Chief Justice Vinson said:

> "Chief Judge Learned Hand, writing for the majority of the Court below, interpreted the phrase (clear and present danger) as follows: 'In each case (courts) must ask whether the gravity of the "evil", discounted by the improbability, justifies such invasion of free speech as is necessary to avoid the danger.' 183 F. 2d at 212. We adopt this statement of the rule."

The restrictions of the Act were upheld on the ground of clear and present danger. This was a matter to be decided by the courts, not Congress. Since *Dennis* was decided and since the Act under review here was passed by Congress, conditions in the world have radically changed. The decision was clearly based on the belief that we were threatened by war with a powerful Communist bloc, headed by

the Soviet Union, and that there were ties between the leaders of the world Communist movement and the leaders of the American Communist Party which created a danger to our national security. See pp. 511, 547, 563, 589. Happily the danger of international conflict is receding. In his final statement at the close of the recent Geneva conference, President Eisenhower said:

> "If our peoples in the months and years ahead broaden their knowledge and their understanding of each other as we, during this week have broadened our knowledge of each other, further agreements between our governments may be facilitated * * *. I came here (to Geneva) because I believe mankind longs for freedom from war and rumors of war. I came here because of my lasting faith in the decent instincts and good sense of the people who populate this world of ours. I shall return home with these convictions unshaken and with the prayer that the hope of mankind will one day be realized." (New York Times, July 25, 1955.)

Time and again during and since the Geneva conference the President has expressed his faith that the leaders of the Soviet Union as well as its people sincerely desire peace. In Geneva he said: "There is evidence of a new friendliness in the world." (New York Times, July 27, 1955.)

It is true, as the President indicated in his address to the American Bar Association on August 24, 1955, that Geneva has not settled grave specific issues. It is equally true, however, as the President said, that "Geneva spells for America not stagnation but opportunity. Opportunity for our own people and for people everywhere to realize their just aspirations."

On the same occasion Chief Justice Warren truly said:

> "We, and other free countries, are endeavoring to demonstrate that freedom and dignity for all constitute the only sound basis for world peace. In such a gigantic struggle where the eyes of a critical world are constantly on everyone, the power of example is far more forceful than that of precept."

An article in the New York Times for August 7, 1955 written in Moscow under the by-line of Harry Schwartz headed "Signs of Eclipse of Molotov Noted" says that Soviet Foreign Minister "may have suffered a sharp eclipse in power and prestige along with the eclipse of the 'hard foreign' policy he laid down only six months ago . . . Last week, Premier Nikolai Bulganin uttered only soothing words, words of peace and good will, words echoed by lesser figures in the supreme Soviet debate that followed his speech."

In the same edition of The Times appeared an article headed "U. S., Soviet Closer on Atom Security" which quoted a United States official as saying:

> "Once you accept these basic principles there is only one way your policy can be directed. You have to try to figure out some means whereby you and the other fellow can live in the same world together. Otherwise you die together."

The article went on to say:

> "Moreover, another vital conclusion has been drawn —one that thus far seems at least partly to be accepted by Moscow. If the great powers are not going to defeat each other or destroy each other by nuclear attacks then they must learn how to live with each other and with their differences.
>
> This means that diplomacy assumes a new importance. Negotiators must sharpen their skills to try to ease tensions."

These are but a few of the indications filling the press of the world indicating that we are entering a new era of peaceful co-existence. But while the world moves the statute under review remains frozen in an earlier concept. If the new era is to be brought in it needs the popular support which the Act stifles.

In his address to the American Bar Association on August 24, 1955, President Eisenhower said that our program must be "dynamic and flexible" and the goals we seek could

never have been achieved "when men and nations confronted each other with hearts filled with fear and hatred" (New York Times, Aug. 25, 1955). Thus, the head of the Executive branch of our Government takes a position in 1955 which negates the findings of Congress in 1950 as expressed in Sec. 2 of the Act, which are based on fear, not faith; hatred, not amity.

Will President Eisenhower be denied a passport or required to register under the Act? Of course not. Senator Ellender was quoted in the New York Times for August 25, 1955 as saying in Moscow that if people who oppose friendly visits to the Soviet Union "came here they might see things in a different light." Will he and other members of Congress become victims themselves of the gag law they passed? One evil of the law is that it is bound, in practice, to be discriminatory.

Another evil in writing alleged findings of fact into law is that there is an assumption that history is static. The law remains on the books to plague us long after the concepts on which it is based have been outmoded by passing events. Who in Congress could have predicted when the Act was passed how vastly changed the world atmosphere would be before its constitutionality could be passed on by this Court?

An article in The Nation for August 20, 1955 says:

> "The Geneva Conference was born in January 1954 when it was decided at NATO headquarters in Paris that a future war should be fought with atomic weapons. It is almost a gift from Heaven that in this crucial time a man like General Eisenhower, with his military knowledge coupled with a deep humanitarianism and a sense of responsibility, is the President of the United States. Thanks to Geneva he has become a symbol of peace and the hope of peoples everywhere."

Even more significant of the changed conditions than the friendly utterances of statesmen are the exchanges of information on hitherto carefully guarded atomic secrets by

the scientists in the recent meeting in Geneva and the invitation to the scientists of the Soviet Union to visit the principal atomic energy plant in Great Britain and to make a complete inspection. It is inconceivable that the curtain of secrecy which has been so closely drawn over the area of nuclear energy could have been lifted had not the responsible heads of the Western governments, including our own, reached conclusions as to the danger of war which are at complete variance with the premises of the Act.

In a dispatch to the New York Times of August 20, 1955, from Geneva, Michael J. Hoffman says of the role of Americans at the Conference of Scientists:

> "It is impossible, American representatives here believe, that the demonstration of good faith and scientific leadership should not redound to the political advantage of the United States in the broadest sense of the term."

In an article on disarmament in the New York Times for August 21, 1955, Harrison E. Salisbury writes:

> "The questions the United States poses—questions of mutual survival in a nuclear world—are a measure of the metamorphosis in Washington's thinking on the subject.
>
> "Evidence of these changes has multiplied rapidly in recent weeks. Actually, the roots go back to the appointment of Mr. Stassen in March."

And on the same date the New York Times said editorially under the caption "An Atomic Milestone":

> "The first International Conference on the Peaceful Uses of Atomic Energy has ended in Geneva in what is universally acclaimed as a resounding success that made it a new milestone in the atomic age. Bringing together the leading atomic scientists from seventy-two nations, including in particular Soviet Russia, it not only rose above all political and ideological boundaries but also lifted a good part of the secrecy surrounding the new forces modern man has unleashed and turned the world's attention from their destructive potentialities to their constructive possibilities."

Also significant is the increasing flow of observers in both directions including the visits of farmers from the Soviet Union to this country and of American farmers to the Soviet Union.

In *Chastleton Corp.* v. *Sinclair* (supra), it was held that a law depending upon the existence of an emergency or other state of facts to uphold it may cease to operate if the emergency ceases or the facts change. The facts have changed since the Act was passed.

We believe that this Court has the opportunity and duty to make a contribution of utmost value to this new movement for better understanding by striking down this Act which is based on fear and false concepts of security. The Court can and should review the findings of fact on which clear and present danger was predicated in *Dennis* which, in the opinion of the Court, justified curtailment of First Amendment rights. If the danger has receded and if, as we believe, the current danger is not from attack from without but from the eroding of our liberties from within, the Act is clearly lacking in constitutional sanctions and is itself a clear and present danger to our historic freedoms and institutions, and should be struck down. Many of the most prominent leaders in our country, clergymen, rabbis, educators, editors, and jurists, including members of this Court have voiced alarm that freedom of speech and association are threatened as never before in our history. At least three Justices of this Court, Chief Justice Warren,[1] Mr. Justice Douglas[2] and the late Mr. Justice Jackson[3] have expressed their concern over the situation in widely reported public addresses.

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[1] Speech Reported in New York Times, Thursday, January 14, 1954, Dinner of Alumni of Columbia University.

[2] Address to American Law Institute, Washington, D. C., May 20, 1953.

[3] Address to New York State Bar Association, New York Times, January 31, 1954.

While the tide of repression in the name of combating Communism has mounted, the Communist stream of propaganda itself has dwindled. Yet the menace attributed to Communism has created a danger for every American who does not toe the orthodox line. As this is written a Congressional Committee is conducting an investigation into the entertainment industry and asking actors about their political beliefs as if there could be something subversive in speaking or listening to the lines of a play if spoken by the lips of a heretic. This is merely one straw in a vast gale of censorship, public and private, in which individual liberties are being blown away.

We believe that Judge Learned Hand, who wrote the opinion of the Court of Appeals in *United States* v. *Dennis,* 183 Fed. 2nd 201, was aware of the changed atmosphere of this day from that in which he wrote that opinion, when he said in a speech at the University of New York on October 24, 1952:

> "Risk for risk, for myself I had rather take my chance that some traitors will escape detection than spread abroad a spirit of general suspicion and distrust, which accepts rumor and gossip in place of undismayed and unintimidated inquiry. I believe that that community is already in process of dissolution where each man begins to eye his neighbor as a possible enemy, where non-conformity with the accepted creed, political as well as religious, is a mark of disaffection; where denunciation, without specification or backing, takes the place of evidence; where orthodoxy chokes freedom of dissent; where faith in the eventual supremacy of reason has become so timid that we dare not enter our convictions in the open lists, win or lose. Such fears as these are a solvent which can eat out the cement that binds the stones together; they may in the end subject us to a despotism as evil as any that we dread • • • *who knows but we may be on a slope which leads down to aboriginal savagery.*" (Emphasis supplied.)

Here, indeed, is a clear and present danger expressed by some of our greatest jurists which, weighed in the balance of probabilities against the danger found in *Dennis* v. *United States* (supra), may well demand the immediate strengthening by the courts of First Amendment protections.

To avoid burdening the Court with what it already knows about the honest fears of honest men that our traditional liberties are threatened, we confine ourselves to a few quotations from among the hundreds that have appeared in recent months.

In his report as President of the Fund for the Republic (N. Y. Times Aug. 22, 1955) Dr. Robert M. Hutchins declared:

> "The misunderstanding of civil liberties, the indifference to them, and the violations of them, to which we too easily grow accustomed, are still such as to cause alarm," noting that a political party had been identified with the "enemy", Dr. Hutchins added that "it has appeared that the peril to the country could be dealt with only by methods that drastically departed from those that have characterized Anglo-American jurisprudence."

Among other important statements are the following:

> "Under the plea that the structure of American society is in imminent peril of being shattered by a satanic conspiracy, *dangerous developments are taking place today in our national life.* Favored by an atmosphere of intense disquiet and suspicion, a subtle but potent assault upon basic human rights is now in progress." (Emphasis supplied.) From statement of General Council of the Presbytrian Church in the United States of America reported New York Times, November 3, 1953.

> "This incident (the examination of Bishop Oxnam by a Congressional Committee) is indicative of a trend in our American life *that threatens the security of our institutions and causes us to fear for the future of our*

long, established liberties." (Emphasis supplied.) From statement of Council of Bishops of the Methodist Church adopted at the annual meeting in Omaha, Neb. Apr. 30, 1953, and reported in The Churchman for June 1953.

"If it is important to detect a conspiratorial Communist who wears the robes of a clergyman, it is equally important not to confuse a 'liberal Christian' or honest advocate of social reform with Communists. *This is something which is now happening to an alarming degree.*" From National Council Outlook, official journal of the National Council of Churches, in its issue of May 1953.

"In the midst of this roaring wilderness of political atavism, where the very air is filled with bombast, menace and threat, there has been a dismaying silence on the part of political figures whom Americans have always regarded as bold and passionate defenders of traditional American liberties and rights. This ignominious silence is itself a *measure of the abyss into which we have plunged.*" (Emphasis supplied.) From Congress Weekly, published in New York by the American Jewish Congress, editorial in issue of May 11, 1953.

"A more basic threat has been a growing tendency on the part of our people and their representatives in government to suppose that it is within the competence of the State to determine what is and what is not American." From statement by General Board of the National Council of Churches of Christ in America, reported in The New York Times, p. 20, Mar. 18, 1954.

Such quotations from high sources could be multiplied. The concept has been growing that the threats contained in the Smith Act extend to all sorts of organizations and to other ideas than the advocacy of force and violence. The Act under review confirms the fear. Persons advocating ideas for social reform or even peace advocates are to be subjected to or threatened by repressive action. Clearly the emphasis since the decision in *Dennis* has shifted and the weighing of probabilities of danger needs to be undertaken by the Court anew.

The opinion of the Court below in dealing with the right of an individual in a proscribed organization to withdraw or to seek Court review overlooks the basic error of the Statute. An individual has a Constitutional right to belong to an organization "infiltrated" with Communists. He should not be required to find out whether this is or is not a fact. He should not be required to withdraw or submit to penalties even if it should be determined by procedural due process that such is the fact. The test should be whether the organization has engaged in punishable activity. The test of the Act is association. It makes the Communist a political leper with whom non-Communists cannot work for the cause of peace or any other cause no matter how worthy. As the Court below correctly states "The critical questions concerning a so-called 'outlawry' statute are whether the matter prohibited is eligible for prohibition" but denying rights of association for constitutionally protected activities is ineligible for prohibition.

In the opinion of most Americans one of the most weakening and repugnant features of the Soviet Union has been what Sidney and Beatrice Webb called "the disease of Orthodoxy." The Act under review is an attempt to inject this virus into our American System in virulent form. Only this honorable Court can provide the antidote. It can help to restore our reputation in the world as the stronghold of liberty and our rights of freedom of speech and association at home by declaring the Act void.

CONCLUSION

We submit that the Subversive Activities Control Act should be held unconstitutional on its face. It follows that the decision below should be reversed.

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Miss Dorothy Clarke Wilson
Bangor, Maine

The Rev. Roy M. Wingate
Belgrade, Nebraska

The Rev. George R. Wolverton
Sunapee, New Hampshire

The Rev. Leland Foster Wood
Rochester, New York

Prof. Thomas Woody
Philadelphia, Pa.

Mr. Victor S. Yarros
La Jolla, California

Quentin D. Young, M.D.
Chicago, Illinois

The Rev. Fred Zimmerman
Sandusky, Ohio

APPENDIX B

August 18, 1955

Hon. Simon E. Sobeloff
Solicitor General of the United States
Washington, D. C.

Dear Sir:

COMMUNIST PARTY OF THE UNITED STATES vs.
SUBVERSIVE ACTIVITIES CONTROL BOARD No. 48
October Term, 1955

In accordance with Rule 42 of the Revised Rules of the Supreme Court, I hereby request your consent to my filing of a brief *Amici Curiae* on behalf of a considerable group of prominent American citizens none of whom are Communists. The nature of their interest (Rule 2a) is their belief that serious constitutional questions are involved which far transcend those of the Communist Party itself. Some of them are or may be members of organizations which may be affected if the Subversive Activities Control Act of 1950 is held to be constitutional. If you wish the names and addresses of the persons who wish to act as Friends of the Court, I shall be glad to supply them.

I note the requirements of Rule 2b. I judge that it is not the intent of this rule to prevent the filing of an *Amicus* brief in a case where all important points of law will, no doubt, be covered by skillful counsel for appellant. The point of view from which the proposed brief approaches the problem, the nature of the interest, the emphasis and frame of reference are different from that of appellant. It will, moreover, raise a fundamental question as to whether "the clear and present danger" which justified the decision of the Supreme Court in *United States v. Dennis* is what it was when that restriction of First Amendment rights was upheld, or whether in the changed climate of today the

Court should re-consider that question with relation to such legislation as the 1950 Act under review. So far as I know this point will not be raised in appellant's brief.

Sincerely yours

ROYAL W. FRANCE

RWF/ts

APPENDIX C

OFFICE OF THE SOLICITOR GENERAL
WASHINGTON, D. C.

August 25, 1955

Royal W. France, Esq.
104 East 40th Street
New York 16, New York

Re: *Communist Party of the United States* v. *Subversive Activities Control Board, No. 48*

Dear Mr. France:

I have your letter of August 18, 1955, in which you request consent to filing of a brief *amici curiæ* in this case "on behalf of a considerable group of prominent American citizens none of whom are Communists". We have carefully considered your request, and regret that we cannot accede to it.

As you are aware, the Government believes that it must in each instance evaluate a particular request for consent in order to ascertain whether it meets the criteria appropriate for application under Rule 42 of the Revised Rules of the Supreme Court. Accordingly, we are obliged to consider, among other things, "the nature of the * * * interest" (Rule 42, par. 3) of the individual or group requesting consent.

Your request in this case is made "on behalf of a considerable group of prominent American citizens", some of whom "are or may be members of organizations which may be affected if the Subversive Activities Control Act of 1950 is held to be constitutional." From the description you supply, the group's interest seems too remote, indirect, and contingent to justify consent. There appears to be little more reason for this particular group to file a brief *amicus curiae* than for any other Americans, either singly or as a group. In the circumstances, we have been unable to conclude that this is an appropriate instance in which Government consent should be given.

This does not imply that the request of an *ad hoc* group could never warrant consent. We are sure you will understand, however, that unless there is a satisfactory showing of a direct or special interest or concern, the granting of consent would not be compatible with our responsibilities to the Court under its Rule.

This does not, of course, in any way prejudice your right to present a timely motion to the Court for leave to file your proposed brief. I may add that if you should file such a motion, the Government would not oppose it.

For your general information, a copy of a memorandum stating this Office's position on consent to *amicus curiae* briefs is enclosed.

Sincerely yours,

SIMON E. SOBELOFF
OHP

Simon E. Sobeloff,
Solicitor General.